American Mirror Co., Inc. and United Furniture Workers of America, AFL-CIO. Case 5-CA-13895

19 April 1984

DECISION AND ORDER

By Chairman Dotson and Members Hunter and Dennis

On 27 September 1982 Administrative Law Judge Russell M. King Jr. issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.²

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

¹ The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We correct the following inadvertent errors in the judge's decision:

Throughout the decision, the judge referred to one of the Respondent's witnesses as Thelma Pope. Her name, as shown in the record, is Thelma Poe. Also, in sec. II.A, par. 5 of the decision, the judge referred to a 23 January employee meeting. The correct date of that meeting, as found elsewhere in the decision, is 23 June.

² Contrary to her colleagues, Member Dennis would find that the Respondent violated Sec. 8(a)(1) when Chairman Morris stated, in response to a question why employees had not received a wage increase, that it was because the Union had started "messing" or "fooling around."

DECISION

STATEMENT OF THE CASE

RUSSELL M. KING JR., Administrative Law Judge. This case was heard by me in Galax, Virginia, on July 29, 1982. The charge was filed on November 18, 1981, by the United Furniture Workers of America, AFL-CIO (the Union). On January 12, 1982, the complaint was issued by the Regional Director for Region 5 of the National Labor Relations Board (the Board) on behalf of the Board's General Counsel. On July 6 the Union was

¹ All dates hereafter are in 1981 unless otherwise indicated.

certified by the Board as the collective-bargaining agent of some 110 production and maintenance employees of American Mirror Co., Inc. (the Company).3 The Union's organizational campaign had commenced in late March. The complaint alleges that during the campaign and on June 23 a co-owner of the Company threatened to discontinue customary and general wages increases because of the union activities of employees, and that on and after May 18 the Company, without consulting with the Union, refused to grant such wage increases because the Union had filed its representation petition on April 30, in violation of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act).4 The Company defends on the grounds that there was no pattern or practice of periodic wage increases, and that no wage increases were considered during the period invovled for fear of improperly influencing the employees in the upcoming union election. The Company additionally defends on the gound that the Union's charge in the case was untimely filed, and thus the Board has no jurisdiction in the case.

On the entire record, including my observations of the demeanor of the witnesses,⁵ and after due consideration of the briefs filed herein by the General Counsel and counsel for the Company, I make the following

FINDING OF FACT

I. JURISDICTION

The pleadings, admissions, and evidence herein established the following jurisdictional facts. The Company is a Virginia corporation with its office and place of business (or plant) in Galax, Virginia, where it is, and has been at all times material herein, engaged in the manufacture and sale of mirrors. During the year prior to the issuance of the complaint, and in the course of its business operations described above, the Company sold and shipped products valued in excess of \$50,000 directly to points located outside the State of Virginia. Also during the same period the Company purchased and received

The pertinent parts of the Act provides as follows:

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to barain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection

² The term "General Counsel," when used hereafter, will normally refer to the attorney in this case acting on behalf of the General Counsel of the Board, through the Regional Director.

³ Case 5-RC-11514. The representation petition was filed with the Board on April 30. The Board-conducted election was held June 25.

Sec. 8. (a) It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor oragnization (5) to refuse to bargain collectively with the representative of his employees

⁸ The facts found herein are based on the record as a whole and upon my observation of the witnesses. The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits with due regard for the logic of probability, the demeanor of the witnesses, and the teaching of NLRB v. Walton Mfg. Co., 369 U.S. 404, 408 (1962). As to those testifying in contradiction of findings herein, their testimony has been discredited either as having been in conflict with the testimony of credible witnesses or because it was in and of itself incredible and unworthy of belief. All testimony and evidence, regardless of whether or on the mentioned or alluded to herein, has been reviewed and weighted in light of the entire record.

materials and supplies valued in excess of \$50,000 directly from points located outside the State of Virginia. Thus, and as admitted, I find and conclude that the Company is now, and has been at all times material herein, an employer within the meaning of Section 2(2), (6), and (7) of the Act.

Also as admitted, I find and conclude that the Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Summary of Testimony and Evidence⁶

Employee Ricky Widner testified as a present employee, working as a glass cutter, and had worked for the Company since August 1976. Widner testified that throughout the years raises were announced by being posted on the bulletin board and that he was never given a performance evaluation before any raises. Widner indicated that by 1981 he came to expect raises but conceded that the timing and amount of the raises varies from year to year.7 Widner testified that his last increase was January 29 for 10 cents and that in late March or early April the Union commenced its organizing campaign. Widner testified that on June 23, 2 days before the union election, the Company held an employee meeting where all employees were gathered. According to Widner, present were chairman of the board Tom Morris and his son and president of the Company Frank Morris, together with all supervisors. Widner indicated that at this meeting one employee asked why they had not received their raises and according to Widner, Tom Morris replied that the Company "had been giving raises in the past until the union started messing or fooling around." Widner testified that he was a member of the Union's bargaining team and that after the election the first bargaining session was held on July 27. Widner indicated that at that session International Union Representative Charles Thomas, who was also on the bargaining team, asked President Frank Morris to continue the raises and Morris replied that the raises would "probably" have been given if it had not been for the union activities, adding that because of the union activities and campaign the Company was not permitted to give any raises. Widner related that prior to the election the employees had passed out "leaflets" each week which contained a request to continue the wage increases. Widner added that in later bargaining sessions the matter of wage increases as again brought up and that the Company's position was always that they were not "withoutholding" and did not owe any raises. Widner testified that at one of the later negotiation sessions he made a claim to the Company on behalf of the employees for retroactive wage increases for April or May and for July, that the Company's response was that it had not withheld a wage increase during the campaign, again stating that the Company's position was that the only wage proposal was that which was reflected at the bargaining table and in the event a contract was signed.

Norman Sawyers testified as a present employee of the Company where he had worked since 1969. Sawyers indicated that raises in the past had been posted and were granted without evaluations, and that the last raise was January 1981. He indicated that he also expected to receive additional raises in 1981. Regarding the June 23 employee meeting, Sawyers testified that chairman of the board Tom Morris was asked about wage increases and he replied that the employees had not been getting them "probably because the union started fooling around." Sawyers was a member of the union bargaining committee and testified that at the first session, about July 27, Union Representative Thomas asked Company President Frank Morris why the employees had not been getting raises, and according to Sawyers, Morris replied that he thought the Company was not supposed to give raises during the union activity. Thomas, in turn, replied that they should have been given if they were given in the past and asked Morris if they would have been given if there had been no union activity, to which Morris replied "probably." Accordingly to Sawyers, the subject of the wage increases was brought up at subsequent bargaining sessions but the Company refused to change its policy. In cross-examination, Sawyers indicated that he understood the Company's position to be that any further raises had to be negotiated.

Charles Thomas testified as the International union representative who aided the Union in its organizational campaign commencing in late March, and who participated in most of the subsequent bargaining sessions after the union election. Thomas testified that he was aware of the Company's wages increases over the past several years from talking to the employees and that he calculated that another wage increase was due around May. According to Thomas, the employees had told him in April that they had heard the raises were not going to be given by the Company. Thomas identified two leaflets that he prepared for distribution during the union campaign.⁸

⁶ The following includes a summary of the testimony of the witnesses appearing in the case. The testimony will appear normally in narrative form, although on occasion some testimony will appear as actual quotes from the transcript. The narrative only and merely represents a summary of what the witnesses themselves stated or related, without credibility determinations unless indicated, and does not reflect my ultimate findings and conclusions to this case.

TDuring the contract negotiations after the election the Company voluntarily furnished a list of the across-the-board hourly wages increases the Company had granted employees from 1970 through January 29, 1981, the date of the last increase. This list was also admitted into evidence in this case, without objection. The hourly wage increases appearing in the list are as follows: 1970, 1/29-5 cents, 10/8-5 cents; 1971, 7/7-5 cents; 1972, 1/13-5 cents, 5/18-5 cents; 1973, 1/11-5 cents, 3/22-5 cents, 8/23-5 cents; 1974 1/24-5 cents, 5/15-5 cents; 1975, 4/30-5 cents, 9/4-10 cents; 1976, 7/3-15 cents, 12/9-5 cents; 1977, 1/20-5 cents, 6/23-10 cents, 10/27-5 cents; 1978, 2/2-5 cents, 4/27-5 cents, 6/8-5 cents, 9/13-5 cents, 11/22-5 cents; 1980, 1/17-10 cents, 5/22-5 cents, 8/4-5 cents, 11/20-5 cents; 1981, 1/29-10 cents.

⁸ From their contents and dates, it appears that one leaflet was prepared in early May and the other approximately mid-May. The leaflet prepared in early May stated that the Union desired the Company give the employees their "usual raises" until the Union has a chance to bargain with the Company. This early May leaflet also contains the follow-

The company is forbidden by law to change the way it pays us while we are organizing. They have given a raise every three Continued

Thomas testified that the first session was held July 29 during which he asked Frank Morris to grant the pay increases that were due the employees and that he and Morris then discussed what "the law was." According to Thomas, the Union's position was that the increases were "customary" and should be granted, and the Company's position was that any increase during the campaign would be to influence the employees and thus would be improper. According to Thomas Frank Morris also stated at the session that had it not been for the Union the Company "probably" would have given increases in May or June. Thomas testified that after the first session of July 29 there followed approximately 10 additional bargaining sessions and that at most, if not at all of these sessions, the subject of the wage increases was brought up, but that the Company always maintained that no increases were due. Thomas added that at the August negotiating session the Company made a wage offer and that subsequently an "interim" agreement was entered into, providing for a 15-cent-an-hour increase effective March 11, 1982, plus a 5-cent-an-hour increase in both June and September 1982. According to Thomas, to date no actual contract has been entered into.

Frank Morris testified as president of the Company. He is the son of chairman of the board Tom Morris, who had founded the Company some 25 years ago. Morris testified that regarding wages in general before granting increases he considered timing, how business was, and competitive situations. Morris added that he and his father would also accomplish at least quarterly inventories, and the results of these inventories would be considered in possible wage increases. Morris testified that he learned of the union organizational campaign in late March and further learned in early April that the Union would file a petition for representation with the Board. Morris freely conceded that he was opposed to the Union, but added at the time he learned the petition would be filed, the Company had no plans for any future wage increases. Morris added that the Company has never had a program of a specific wage increases at any certain time of the year, and that in the past when he and his father had decided on increases, they would tell bookkeeper Thelma Pope, who in turn would implement the increases and post a notice of the increases on the bulletin board. Morris related that the last pay increase was announced for January 29, and again stated that no plans were made for any increases thereafter. Morris testified that he attended the first negotiation session in July when union representative Thomas did bring up wage in-

months in the past and the law says they can't refuse to give it now and blame it on the union.

creases, and asked that they be implemented. Morris also conceded that Thomas asked whether the increases would have been given if there had been no union activity, and related that his answer was "a possibility." Morris testified that he felt the Company was not free to give wage increases during the union campaign and thus increases were not considered. Morris also added that during the organizational period, business "wasn't all that good, and the company was . . . losing money." Regarding the January 23 employee meeting, Morris testified that he and his father first read from prepared text, and then asked for questions. Morris conceded that there were questions but he did not remember any specific remarks that his father made, including any remark regarding the Union "fooling around" or "messing around."

Thomas H. Morris testified as a current chairman of the board and chief executive officer of the Company he had started some 25 years ago. He indicated that at the June 23 employee meeting, he and son Frank first read prepared statements to the employees and then the meeting was opened for questions. According to Morris, this resulted in "confusion" and he never heard a question asked. Morris denied that he made any comments about wage increases and denied any remarks about the Union "fooling or messing around." According to Morris, once the "confustion" started the meeting was ended. Morris went on to testify that the Company never had a program of periodic wage increases at set times, and that after the January increase there were no plans or decisions regarding future wage increases. Morris related that he took no part in the union matter or the negotiations, all of which was handled by his son. He indicated that the year 1981 was a "bad" year and inventories were conducted "about every 60 days."

B. The Defense of Timeliness of the Charge

Section 10(b) of the Act provides that no complaint shall issue based on any unfair labor practice occurring more than 6 months prior to the filing of the charge. The charge in this case was filed by the Union on November 18 and alleges that the Company withheld customary wage increases "on or about May 5, 1981 and continuing to the present" The complaint alleges that the withholding commenced "on or about May 18, 1981," and was the result of the filing by the Union of its representation petition on April 30. The May 18 date recited in the complaint is 6 months to the day the charge was actually filed. The closes wage increases near or in May the 4 previous years were June 23, 1977, June 8, 1978, June 7, 1979, and May 22, 1980. The testimony and evidence in the case further reflects that by the first week in May some employees and the Union at least suspected that wage increases would not be granted. This fast became definite at the first bargaining session on July 27 or 29. The Company argues that since the charge recites that date of May 5 and the Union knew about the withholdings about that date, the 6-month limitation period had expired by several weeks when the charge was actually filed on November 18.

I find and conclude that the Company's defense regarding the timeliness of the charge is without merit in

The second leaflet contains the following under the subject of "rumors":

The old rumor that the union is keeping us from getting a raise is still going around. In fact, the law says the company doesn't have a right to change anything, including giving scheduled raises. So the company CAN and SHOULD give a raise now. The purpose of a union is to help us get a raise, not keep us from getting one.

Thelma Pope testified that she was in charge of bookkeeping and payroll, and also assistant treasurer of the corporation. She indicated that she was responsible for implementing pay increases after "management" informed her that there would in fact be an increase. According to Pope, she never had any standing instructions regarding giving wage increases at any certain or specific period of time.

this case. The alleged unlawful withholding of wage increases was of a continuing nature, lasting at least thoughout 1981.¹⁰ Additionally, I find that the Union was not actually put on notice, either actively or constructively, of the Company's actual position and intent regarding wage increases until the first bargainng session in late July. The Board has held that the 6-month limitation period is tolled until such notice or knowledge is received.¹¹

C. The Wage Increase Withholdings During the Campaign and the Remark at the July 23 Employee Meeting

The Board has examined the question of wage increase withholdings during and after the union organizational campaigns in a multitude of cases over the years. Numerous authorities can be generally cited both for and against the legitimacy of such withholdings. Thin and almost subtle distinctions are found in many of the cases. For example, the Board has held that it is the employer's legal duty to proceed as he would have done had the Union not been on the scene, 12 but the Board has also held that it is not unlawful per se for an employer to deny wage increases during a union campaign, for otherwise it may be accused of attempting to influence employees to decide against being represented by the Union.13 To threaten employees with complete abrogation of increases has been held to be unlawful.14 and likewise in the case of withholding an already determined, announced, and scheduled wage increase.16 it also appears that the Board makes a distinction between an announced and scheduled increase, considering the same as an "existing" benefit, 16 and a possible or expected increase but one not based on promise but upon increases in previous years where no specific date or amount could be set with any degree of certainty. 17

An attempt to fit this case into the niche of one or more existing Board authorities has proven most difficult. The testimony of the Company's president Tom Morris and his father Frank Morris reflect three somewhat inconsistent reasons for the failure to grant a wage increase during the campaign, to wit: that one was simply not planned or considered, economics would not permit an increase, and it would be improper or unlawful to grant any increase during the campaign. I find that in truth, and in fact, no increase was granted because the Company had been told or had concluded that it would be unlawful. The Union's position was clear, and exactly

opposite. ¹⁸ I find and conclude that the Company's position was correct under the circumstances of this case. No wage increase was determined, promised, scheduled, or announced. Further, and in my opinion, it cannot be implied, inferred, or concluded in this case that there was an existing benefit by virtue of the Company's pattern of wage increases in previous years, which varied as to date and amount. Thus, I find that there was no denial of any existing benefit, and accordingly I find that there was no violation of the Act in this regard during the campaign.

The complaint alleges separately that at the June 23 employee meeting Tom Morris in effect threatened employees with wage increase withholdings because of their union activities. Employee Widner and Sawyers testified that at the meeting an employee question was asked as to why they had not received a wage increase and Morris replied essentially that it was because the Union had started "messing" or "fooling around." Morris denied any such remark and his son Frank did not remember any such remark. I credit Widner and Sawyers over Tom Morris in this instance and find that the remark or response was made. 19 However I do not find that Morris' reply was threating or coercive. Although put rather indelicately, in my opinion it merely reflected the true position of the Company as found above, that the Company could not properly or legally give a wage increase during the campaign. I thus find that the remark did not violate the Act.

D. The Alleged Refusal to Bargain Over the Raises

The complaint alleges that the Company's failure to bargain with the Union about the raises both before and after the Union's certification by the Board as the bargaining agent of the employees violated Section 8(a)(1) and (5) of the Act. My earlier finding that the failure of the Company to grant a raise during the union campaign was not violative of Section 8(a)(1) and (3) of the Act additionally absolved the Company from any duty to bargain about the raise during the campaign.

The Union was certified on July 6. Contract bargaining commenced in late July. Throughout the negotiations the topic of the previous or so-called "customary" increases came up. The Union's position remained the same, and the Union requested that raises be granted notwithstanding the negotiations, and independent of any final contract. The Company took the position that any raises which would be granted was an issue that was "on the table," to be negotiated and addressed in a final contract.

I find that once the Union was certified, the question of raises became a mandatory subject of bargaining. The duty to bargain collectively under Section 8(a)(5) of the Act is defined in Section 8(d) of the Act as the duty to

¹⁰ NLRB v. Anchor Rome Mills, 228 F.2d 775 (5th Cir. 1956), enfg. 110 NLRB 956 (1954).

¹¹ Metromedia Inc., 232 NLRB 486 fn. 20 (1977); Hot Bagels, 227 NLRB 1597 fn. 4 (1977).

¹⁸ Gates Rubber Co., 182 NLRB 95 (1970).

¹⁸ Great Atlantice & Pacific Tea Co., 192 NLRB 645 (1971). Here the administrative law judge, faced with consistent wage increase programs over at least a 3-year period, found the withholding a violation. The Board reversed the administrative law judge.

¹⁴ Peterson Builders, 215 NLRB 161 (1974).

¹⁵ North Electric Co., 225 NLRB 1114 (1976).

¹⁶ North Electric Co., supra.

¹⁷ Great Atlantic & Pacific Tea Co., supra.

¹⁸ The failure of the Company to grant increases after the Union was certified by the Board as the employees' bargaining agent on July 6 will be discussed later in this decision.

¹⁹ The demeanor of Tom Morris during his testimony reflected at times a certain vagueness and disinterest. Much of his testimony was general, lacking in specifics. He characterized the question period of the meeting as "confusion" and he likewise displayed a certain amount of confusion during his testimony.

"meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . " There is no evidence or allegation in this case that the Company failed to negotiate in good faith the matter of wage increases. What the Union wanted was a continuance of interim or past discretionary raises outside of the contract negotiations. The Union, in other words, wanted the best of both worlds, and under the facts of this case I find that the Company had no legal duty to comply with the Union's request. In this regard, I note the lack of any evidence or testimony in the record to indicate that previous wage increase patterns were acceptable by the Union's as future contract provisions on the subject. I thus find and conclude that the Company did not violate Section 8(a)(1) and (5) of the Act as alleged in paragraphs 11 and 14 of the complaint.20

On the foregoing findings of fact and on the entire record, I make the following

CONCLUSIONS OF LAW

- 1. The Respondent Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
- 2. The Charging Party Union is a labor organization within the meaning of Section 2(5) of the Act.
- 3. The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:²¹

All production and maintenance employees, including assistant foreman and local truckdrivers, employed by Respondent at its Galax, Virginia facility, excluding all other clerical employees, over-the-raod drivers, sales employees, guards and supervisors as defined in the Act.

4. The Respondent Employer did not violate Section 8(a)(1), (3), or (5) of the Act as alleged in the complaint, or otherwise violate the Act.

On the basis of the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended²²

ORDER

The complaint is dismissed.

²⁰ In my opinion, the above conclusion is not contrary to existing precedents on the subject. The Supreme Court in NLRB v. Katz, 369 U.S. 736 (1962), held that a discretionary merit wage increase is a subject of mandatory bargaining. The Court found that an employer's unilateral change (increase) was a violation of Sec. 8(a)(5) of the Act. The Board has construed Katz as holding that an employer with a past history of a merit increase program may no longer continue to unilaterally exercise his direction with respect to such increases, once a union is selected. Peterson Builders, 215 NLRB 161 (1974). However, the Board has also held that the law does not sanction an employer's discontinuance of its past practice of a merit increase program, and has stated that what is required is "a maintenance of preexisting practice, i.e., the general outline of the program, however, the implementation of that program . . . becomes a matter as to which the bargaining agent is entitled to be consulted." Southeastern Michigan Gas Co., 198 NLRB 1221 (1972); Oneita Knitting Mills, 205 NLRB 500 (1973). In Peterson Builders, supra, there was a preelection threat of complete abrogation of a preexisting program of annual increases and evaluation, and the Board held this conduct to be unlawful, citing Southeastern Michigan Gas and Oneita Knitting. In the case at hand, there is no evidence that the Company threatened to deny future raises, or refused to negotiate about them. The Company's refusal to accommodate the Union by granting interim raises, based in some manner on past discretionary and across-the-board raises of differing amounts at differing times was, in my opinion, not an unlawful unilateral change. To find otherwise would be to subject the Company involuntar-

ily to granting some type of interim raises, while facing the obligation to negotiate yet an additional or different wage program without certainty in its outcome or economic effects.

⁸¹ The appropriate unit was alleged in the complaint and so found by the Board in the representation case (5-RC-11514). The Respondent's answer does not deny the appropriateness of the unit, and merely recites that it was not found by the Board.

²² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all pur-